STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Labor Standards Enforcement
Legal Section
olden Gate Avenue, Room 3166
rancisco, CA 94102

1991.10.31

October 31, 1991

Richard J. Simmons, Esq.
Musick, Peeler & Garrett
One Wilshire Blvd.
Los Angeles, CA 90017-3321

Re: **Alternative Work Schedules**

Dear Mr. Simmons:

Your letter regarding the above-referenced subject directed to Jose Millan of our Headquarters staff has been assigned to me for response.

In your letter you ask for an opinion regarding the alternative work schedule provisions of Section 3(B) of Wage Order 5-89. Specifically, you ask that the Division address the question of whether "DLSE will allow employers to accommodate more than one-third of the affected employees, over a period of time, who are unable or unwilling to work an alternative work schedule."

You state that your client implemented a schedule consisting of four 10-hour shifts for a group of 11 employees approximately one year ago. At the time, all 11 of the employees voted unanimously in favor of the alternative work schedule. During the next year, the composition of the group changed due to turnover and the hiring of replacements. Consequently, while the group still consists of 11 employees, several of these employees were hired after the alternative work schedule was implemented. Furthermore, four of the 11 employees have requested permission to work an eight-hour schedule as an accommodation rather than the four-day week that has been utilized. You state that your client would like to accommodate the four employees (although, you point out, it is not required to accommodate all of them, such as the new employees). However, you continue, your client is concerned that an accommodation of four of the 11 employees will result in coverage of only 63.63% of the affected employees; slightly less than a two-thirds majority.

You state that your client feels that:

(1) although the law does not compel the accommodation of new hires, the employer and employees both desire the accommodations; (2) the determination should not turn on the fact that some of the four employees who wish to be accommodated are new hires. The same legal conclusion should apply whether

the four employees in question all participated in the original vote or were hired thereafter; (3) the Wage Order does not specifically preclude the accommodation of more than one-third of the employees, particularly where the accommodation occurs over a substantial period of time; and, (4) it would be highly illogical for the protections of Section 3(B) to be lost many years after an alternative work schedule is implemented simply because, due to attrition or other factors, less than two-thirds of the number of employees in the original affected group still desire the alternative work schedule.

As you know, to determine the intent of a regulation, the inquiry turns first to the words, attempting to give effect to the usual, ordinary import of the language and to avoid making any language mere surplusage; the words must be construed in context in light of the nature and obvious purpose of the regulation where they appear. As a general rule, courts defer to the agency charged with enforcing a regulation when interpreting that regulation because that agency possesses expertise in the subject area The final responsibility for interpreting a regulation rests, of course, with the courts and a court will not accept an agency interpretation that is clearly erroneous or unreasonable. The regulation must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the legislation, practical rather than technical in nature, and which, when applied, will result in a wise policy rather than creating mischief or absurdity. *Aguilar v. Association For Retarded Citizens* ___Cal.App.3d ___; 285 Cal.Rptr. 515.

With this admonition in mind, the Division begins its review of your client's contentions.

In our view, your client's conclusions overlook the fact that the Wage Order specifically states that the accommodation is *only* available to an employee "who participated in the vote which authorized the schedule and is unable or unwilling to work it." This limiting language by the Commission is completely logical. The intent was to protect the employee who was hired to work a five-day, eight-hour workweek from being forced, after accepting such employment, to accept an alternative of that normal workweek. The new employee, however, accepts the alternative workweek as one of the terms and conditions at the outset of his or her employment.

While the Wage Orders may not specifically preclude the accommodation of more than one-third of the employees, in the view of the DLSE, they certainly implicitly preclude such an arrangement.

The Division has never before been called upon to explain its position in regard to the limits placed on the number of persons who may be employed in alternative assignments; but we feel that it

is self-evident that the Commission intended that the "alternative assignment" provided for in Section 3(B)(2) was to be implemented at or near the same time as the "alternative schedule". The provisions of Section 3(C) provide that the alternative arrangement must be evidenced by a written agreement executed by at least two-thirds of the affected employees following a secret ballot election. Section 3(B)(2) provides that the employer shall make a reasonable effort to find an alternative work assignment for any worker who participated in the vote which authorized the schedule and is unable or unwilling to work it. The provisions of Section 3(B)(2) appear in that portion of the Orders outlining the steps to be taken for implementing the alternative workweek plan. This fact clearly implies that the alternative work assignment is to be made in conjunction with the institution of the alternative workweek schedule. Obviously, the Commission was concerned about protecting the worker who had voted against the alternative workweek; for had the worker been "unable or unwilling to work it" they would not have voted for the alternative. Therefore, logic teaches, the Commission intended that only those who voted against the alternative schedule would be the subject of "alternative work assignments". Since those who voted against the alternative schedule cannot exceed one-third of the affected employees, not more than that number will be allowed to work "alternative assignments".

In addition, from a practical point of view, if it became clear to an unscupulous employer that more than two-thirds of the affected employees were dissatisfied with the alternative workweek, that employer could provide the "alternative assignment" of an 8-hour day for a portion of that majority while preserving, for his own advantage, a workforce composed of less than two-thirds of the total workforce who would be working the alternative workweek. In effect, this minority would be precluded from voting to abolish the alternative workweek because they would lack the votes. Such mischief is exactly what the enforcement policy is designed to protect against.

While we understand the concern for the workers which you express in your letter, you must also agree that it would place an unreasonable burden on most employers operating under an alternative schedule if he or she were required to make "reasonable efforts" to find alternative "work assignments" for any worker at any time.

In summary, the DLSE Interpretive Bulletin 89-1 correctly states the position of the Division in this regard. The Division chooses not to retract the limitation of not more than one-third of the employees working other than the alternative workweek. In addition, the position of the DLSE continues to be that an alternative workweek schedule will lose validity if more than one-third of the affected employees are working schedules other than those agreed to under the original plan.

I hope this adequately addresses the issues you raised in your letter of September 6, 1991, to Jose Millan.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw, State Labor Commissioner
James Curry, Chief Deputy Labor Commissioner
Simon Reyes, Assistant Labor Commissioner
Jose Millan, Senior Deputy, Hdqtrs.
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